UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., Plaintiff, - against - ALCOA STEAMSHIP CO., INC., et al., Defendants.	04 Civ. 4309 (LAK) (JCF) MEMORANDUM AND ORDER

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

In this case, the parties have revisited the knotty issue of whether the attorney-client privilege and work product protection are waived with respect to documents reviewed by a testifying expert. From 1982 until 2002, Richard H. Brown, Jr., an attorney, was the representative of a succession of law firms that acted as general counsel to the plaintiff in this action, the American Steamship Owners Mutual Protection and Indemnity Association, Inc. (the "American Club" or the "Club"). (Declaration of Richard H. Brown, Jr. dated Jan. 19, 2006 ("Brown Decl."), attached to letter of Lawrence J. Bowles dated Jan. 23, 2006, ¶ 2). Thereafter, Mr. Brown continued to act as legal advisor to the American Club. (Brown Decl., ¶ 2). The Club has now retained Mr. Brown as its rebuttal expert witness in this case. (Brown Decl., ¶ 1).

In 2004, while acting as legal consultant to the American Club, Mr. Brown was provided with a letter from the law firm of

Thacher Proffitt & Wood to the managers of the Club (the "Thacher Proffitt Letter"). (Brown Decl., ¶ 3). He read it at that time but does not remember reading it subsequently. (Brown Decl., ¶ 4). Mr. Brown indicates that he has not and will not review the letter in connection with his expert testimony. (Brown Decl., ¶¶ 5, 6). Nevertheless, the defendants have demanded production of the Thacher Proffitt Letter as well as any other documents that Mr. Brown authored or received that relate to the issues in this action. (Letter of Seth B. Schafler dated Jan. 25, 2006, at 2). The American Club objects on grounds of the attorney-client privilege and the work product doctrine.

The Club relies primarily on Magee v. Paul Revere Life Insurance Co., 172 F.R.D. 627 (E.D.N.Y. 1997), in which the court held that the language in Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure requiring that "the data or other information considered by [an expert] witness in forming [his] opinion" be disclosed "extends only to factual materials, and not to core attorney work product considered by an expert." Id. at 642. Magee, however, is not consistent with the advisory committee notes to the 1993 amendments to Rule 26(a)(2), which explain that as a result of the amendments,

> litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions -- whether or not ultimately relied on by the expert -- are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Moreover, "the overwhelming weight of authority in this Circuit -- including several recently decided cases -- indicates that the Rule 26(a)(2)(B) disclosure requirement trumps the substantial protection otherwise accorded opinion work product under Rule 26(b)(3)." Aniero Concrete Co. v. New York City School Construction Authority, No. 94 Civ. 9111, 2002 WL 257685, at *2 (S.D.N.Y. Feb. 22, 2002) (collecting cases); see also Ling Nan Zheng v. Liberty Apparel Co., No. 99 Civ. 9033, 2004 WL 1746772, at *2 (S.D.N.Y. Aug. 3, 2004); MIC Communications Corp. v. Dataline, Inc., No. 01 Civ. 3849, 2001 WL 1335291, at *1 (S.D.N.Y. Oct. 30, 2001). Accordingly, neither the attorney-client privilege nor the work product doctrine protect from disclosure materials considered by Mr. Brown.

An additional complication is created by the fact that Mr. Brown acted as counsel to the Club long before he was selected as an expert witness in this case. In that capacity, he reviewed documents such as the Thacher Proffitt Letter without anticipating that they might someday be relevant to his expert opinion. However, for purposes of deciding what information an expert has "considered" under Rule 26(a)(2)(B), no bright line can be drawn at the time of the expert's retention. It is unlikely that an expert can cast from his mind knowledge relevant to the issue on which he is asked to opine merely because he learned it prior to receiving his assignment.

Therefore, the American Club shall produce the Thacher Proffitt Letter and any other documents that Mr. Brown authored or that were given to him by the Club that relate to the subject matter of his report.[1] It should be noted that this ruling is at least theoretically narrower than that requested by the defendants. To the extent that Mr. Brown received documents prior to his engagement as an expert that relate to issues in this case generally but not to the specific issues addressed in his expert report, such documents need not be disclosed.

SO ORDERED.

James C. Francis IV

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
January 26, 2006

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[1] Of course, the Club could have avoided this result by choosing an expert with whom it had no prior relationship and then being circumspect in choosing what documents to provide for the expert's review.

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